

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 January 2005

Case No. 2001 LHC 03049

OWCP No. 5-108954

In the Matter of

CYNTHIA DANIELS,
Claimant
v.

DATALINE, INC.,
Employer

ROYAL INSURANCE COMPANY
c/o FARA, INCORPORATED,
Carrier

Appearances:

John H. Klein, Esq., for Claimant
Amanda R. Castel, Esq., for Employer
Christopher J. Wiemken, Esq., for Employer

Before:

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER ON REMAND

This proceeding involves a claim for temporary total disability and temporary partial disability from an injury alleged to have been suffered by Claimant, Cynthia Daniels, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (Hereinafter "the Act"). A Decision and Order was issued in the above action on June 6, 2003, denying Claimant's claim for compensation under the Act.

The denial of compensation and medical expenses under the Act was appealed to the Benefits Review Board. On June 14, 2004, the Benefits Review Board issued a decision and order remanding the matter for further consideration of Claimant's entitlement to benefits.

The formal record was returned to this office on September 10, 2004. On September 13, 2004, an order was issued scheduling briefs on remand to be received by October 12, 2004. The parties requested an extension of time in which to file briefs, and the date was extended until

November 12, 2004. Employer submitted its remand brief on November 15, 2004. Claimant submitted his remand brief on November 15, 2004.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The sole issue to be decided on remand is whether Claimant is entitled to temporary total disability benefits from September 8, 2000 until March 4, 2001 and temporary partial disability benefits from March 5, 2001 through the present and continuing.

STIPULATIONS

At the hearing, Claimant and Employer stipulated that:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act¹;
2. That an employer-employee relationship existed between the parties at the time of Claimant's injury²;
3. The Claimant sustained an injury arising out of and in the course of her employment on April 4, 2000³;
4. There was a timely report of injury, a timely notice of Controversion, and a timely Employer's first report of accident⁴;
5. The Claimant's average weekly wage at the time of the accident/injury of April 4, 2000 was \$272.99 (computed using only the Claimant earnings from Dataline), resulting in a compensation rate of \$225.32⁵;
6. Claimant was voluntarily paid temporary total disability benefits from April 8, 2000, though April 16, 2000⁶;
7. Claimant returned to work for the Employer as an administrative assistant from April 17, 2000, through September 8, 2000, at a rate of \$7.75 per hour, for 40 hours per week⁷.

¹ TR. at 10.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 10, 18.

⁶ *Id.* at 10.

⁷ *Id.* at 11.

DISCUSSION OF LAW AND FACTS

Testimony of Claimant

Claimant testified that she was previously employed as a firewatch for Employer and that she was injured while working in this position on-board a ship on April 4, 2000. (TR. at 26). Claimant noted that she was paid workers' compensation benefits while she was out of work for a short time following her injury. (TR. at 26). Claimant sought treatment from Dr. Nichols, who assigned light duty restrictions on Claimant's employment. (TR. at 27). Dr. Nichols specifically articulated Claimant's restrictions as no standing or walking for more than fifteen minutes in every hour, and that Claimant must be able to sit when needed. (CX 4). Claimant is also restricted from repetitive lifting of more than ten pounds. (CX 4).

Following her injury, Claimant began working in an administrative assistant capacity for Employer in April 4, 2000. (TR. at 28). Claimant testified that the work in this position was much lighter than that of a firewatch. (TR. at 28). She continued in this position until she was laid off for economic reasons on September 8, 2001.

Claimant testified that she also worked at Lifetouch in J.C. Penney Department Store. Claimant explained that she performs photography work for Lifetouch. (TR. at 22). Claimant worked for Lifetouch approximately seven years prior to her employment with Employer, and presently continues to do so. (TR. at 22). Claimant testified that she does not have her own business as a photographer, and that any commercial photography she engages in is on behalf of Lifetouch. (TR. at 45).

Claimant testified that following her layoff, she met with a vocational counselor named Barbara Byers at the request of Employer. Claimant noted that Ms. Byers performed an evaluation of her, and that Ms. Byers informed her that she would assist in finding Claimant a job. (TR. at 59). However, Claimant testified that Ms. Byers never sent her job openings for which Claimant could apply. (TR. at 59).

Claimant testified that she eventually found another job when she began working as an associate sales person at Dillard's on March 5, 2001. (TR. at 34). Claimant noted that this is a part-time position, and that she works approximately 20 – 25 hours a week. (TR. at 37). Claimant testified that she initially was paid \$9 an hour, but that this was later cut to \$8 an hour. (TR. at 37). Claimant agreed on cross that she has not applied for any full-time positions since leaving the employ of Employer. (TR. at 42).

Claimant testified that she was asked by Chris Sloan and Mike Sampson to possibly return to the firewatch position following her layoff on September 8, 2000. (TR. at 41). Claimant noted that she informed the men that that there was "no way [she] could ever go back because of the problems [she] was having." (TR. at 42). Claimant further testified that she did not recall Mr. Sampson ever asking her to return to the administrative position. (TR. at 42). Claimant testified that she would have preferred returning to the administrative position with Employer, rather than working at Dillard's, if there was an opening. (TR. at 43). Claimant

additionally testified that she had no recollection of a conversation with Mr. Sampson about obtaining a job with Employer for one of her relatives. (TR. at 42).

Testimony of Mike Sampson

Mr. Sampson is employed as the ship repair project manager for Employer. (TR. at 88). At the time of his testimony, Mr. Sampson explained that he had held this position for approximately a year and a half. (TR. at 88). Mr. Sampson noted that he had been in charge of Claimant when she worked as a firewatch for Employer. (TR. at 91).

Mr. Sampson testified that he had contact with Claimant following her layoff from the administrative position with Employer. (TR. at 92). Mr. Sampson explained that Claimant called him seeking employment for her relative. Mr. Sampson further noted that during this conversation, he “asked [Claimant] would she like to come back and work for me in the same position, and she said no.” (TR. at 92). Mr. Sampson testified that this proposition did not refer to the firewatch position, but rather to the administrative assistant position, and that he felt that this fact was made clear to the Claimant during the conversation. (TR. at 92). Mr. Sampson stated that Claimant declined the opportunity by explaining that “her business was doing really well and she was working full-time.” (TR. at 92.)

Mr. Sampson testified on cross that he did not offer Claimant’s relative a job. (TR. at 96). Mr. Sampson explained, “I don’t know about the other employment opportunities they [Employer] have.” (TR. at 96).

Testimony and Report of Barbara Byers

Ms. Byers is a certified vocational rehabilitation counselor who performed a labor market survey for Claimant. Ms. Byers agreed on cross that Claimant was referred by Employer merely for a labor market survey, and that she did not act as an employment agent for Claimant. (TR. at 110). Prior to performing this survey, Ms. Byers reviewed Claimant’s various medical and employment documents, and interviewed Claimant. (TR. at 102). Ms. Byers noted that the medical records revealed that Dr. Nichols had released Claimant from her regular employment as a fire watch, and had imposed restrictions against repetitive bending, lifting, climbing or standing for longer than thirty minutes. (TR. at 103).

Ms. Byers testified that though her review and interview, she was able to determine Claimant’s educational background. (TR. at 104). Specifically, Claimant is a high school graduate, completed three years of college, and had obtained a certificate in photography. (TR. at 104). Ms. Byers also noted that Claimant had an excellent work history in photography. Claimant additionally had experience with customer service, security, data-entry, and had taken some computer courses. (TR. at 104).

Ms. Byers testified that the dates of Claimant’s unemployment following her layoff were the period of time covered by the labor market survey. (TR. at 104). Specifically, the report covers September of 2000 until March of 2001. (TR. at 105). Ms. Byers stated that the Dillard’s sales associate position Claimant obtained in March of 2001 had been readily available since

September of 2000. (TR. at 105). Thus, Ms. Byers opined that Claimant could have obtained this position at an earlier date had she applied. (TR. at 105).

In the labor market survey, Ms. Byers identified additional actual jobs that were readily available to Claimant for which she was qualified and were within her medical restrictions. (TR. at 105). Ms. Byers testified that the majority of the jobs were sedentary are required no lifting, and very little standing or walking. (TR. at 106). Ms. Byers specifically identified the following positions:

1. Sales Associate Position, Dillard's Department Store

The labor market survey noted that several of these positions were available at Pembroke Mall, MacArthur Center, Lynnhaven Mall, Chesapeake Square Mall and Greenbrier Mall from September 1, 2000 until March 1, 2001. The physical demands of these positions were "light" and the employer was willing to train new hires. The wages for these positions were \$8 - \$9 an hour. (EX 9).

The DOT No. for this position is 290.477-014. The job description for this position included receiving payment, setting up displays and customer service. This position required 2 hours of sitting, 4 – 6 hours of walking/standing and 6 – 8 hours of fingering/handling and seeing. (CX 4). Dr. Nichols rejected the Dillard's positions as unsuitable for Claimant, specifically noting, "Not approved. Cannot stand/walk > 15 min. – 20 min. each hour [and] must be able to sit as need. No repetitive lifting > 10 lbs." (CX 4).

2. Customer Service Representative, American Funds Group

The labor market survey indicated that this position was available on November, 16, 2000, December 29, 2000, February 28, 2001, and March 5, 2001. The physical demands of this position was "sedentary," and a qualified candidate required communication and customer service skills, attention to detail, basic computer knowledge, and organizational skills. This job offered a yearly salary of \$20,000-\$25,000 a year, and mandated a forty hour work week. (EX 9).

The DOT No. for this position is 205.362-026. The job responsibilities involved in this opportunity include opening accounts, explaining investment process, and assisting in loan applications. (CX 4). In an eight-hour work day, the employee would engage in sitting, fingering/handling, talking/hearing and seeing for 6- 8 hours. (CX 4). This job description was approved by Dr. Nichols as appropriate for Claimant. (CX 4).

3. Customer Service Clerk, City of Chesapeake

This position was available on January 6, 2001 and March 5, 2001, and was deemed "sedentary" work by the labor market survey. The education and

experience required for this position included a high school diploma or a GED, customer service and clerical skills, and communication skills. This job requires forty hours of work a week, and paid \$8.92 an hour. (EX 9).

The DOT No. for this position is 209.562-010. This position required performance of various clerical duties that necessitate limited knowledge of systems and procedures. The job duties included using a computer, preparing correspondences, proofreading records, sorting files, addressing and stuffing envelopes, using a photocopier and answering phones. (CX 4). In an eight-hour work day, an employer would sit for approximately 4 – 6 hours and engage in fingering/handling, talking/hearing and seeing for approximately 6 – 8 hours. (CX 4). Dr. Nichols opined that this job description fell within Claimant's medical restrictions.

4. Police Dispatcher, City of Virginia Beach

According to the labor market survey, this is a "sedentary" position, and was available on November 2, 2000, November 9, 2000 and March 5, 2001. Consideration for this position required a high school diploma or a GED, pass background check, and keyboarding skills. This position was full time, and paid \$22,014 a year. (EX 9).

The DOT No. for this position is 193.262-014. The responsibilities of this position included operating radio and telephone equipment to receive calls from emergency services, maintaining communication logs, receiving emergency calls from the public and dispatching emergency services. In an eight hour work day, the employee would engage in sitting and talking/hearing for approximately 6 – 8 hours, and in fingering/handling and seeing for approximately 4 – 6 hours. (CX 4). Dr. Nichols approved this job description as appropriate for Claimant. (CX 4).

5. Police Dispatcher, City of Suffolk

The labor market survey indicated that this position was available on December 27, 2000 and February 20, 2001, and was "sedentary" work. This was a full-time position, and paid a yearly salary of \$23,454. Qualified candidates had to possess a high school diploma or GED, be able to type 30 words per minute, and have a clean background. (EX 9).

The DOT No. for this position is 193.262-014. The responsibilities of this position included operating radio and telephone equipment to receive calls from emergency services, maintaining communication logs, receiving emergency calls from the public and dispatching emergency services. In an eight hour work day, the employee would engage in sitting and talking/hearing for approximately 6 – 8 hours, and in fingering/handling and seeing for roughly 4 – 6 hours. (CX 4). Dr. Nichols approved this job description as appropriate for Claimant. (CX 4).

6. Customer Service Clerk, City of Portsmouth

This “sedentary” position was available on February 8, 2001. Consideration for the position required a high school diploma or GED, 1 – 2 years of clerical experience, and computer skills. This position was for forty hours a week, and offered a salary of \$16,124 a year. (EX 9).

The DOT No. for this position is 209.562-010. This position required the performance of various clerical duties that necessitated limited knowledge of systems and procedures. The job duties included using a computer, preparing correspondences, proofreading records, sorting files, addressing and stuffing envelopes, using a photocopier and answering phones. (CX 4). In an eight-hour work day, an employer would sit for around 4 – 6 hours and engage in fingering/handling, talking/hearing and seeing for approximately 6 – 8 hours. (CX 4). Dr. Nichols opined that this job description was appropriate because it fell within Claimant’s medical restrictions.

7. Police Dispatcher, City of Chesapeake

The labor market survey specified that this was a “sedentary” position that was available on December 27, 2000. This was a full time position and paid a year salary ranging from \$21,433 to \$34,290. Qualified candidates had to possess a high school diploma or GED, be able to type 30 words per minute, and have a clean background. (EX 9).

The DOT No. for this position is 193.262-014. The responsibilities of this position included operating radio and telephone equipment to receive calls from emergency services, maintaining communication logs, receiving emergency calls from the public and dispatching emergency services. In an eight hour work day, the employee would engage in sitting and talking/hearing for roughly 6 – 8 hours, and in fingering/handling and seeing for around 4 – 6 hours. (CX 4). Dr. Nichols approved this job description as appropriate for Claimant. (CX 4).

8. Customer Service Representative, Nations Bank

This full-time “sedentary” position was available on December 1, 2000, and paid an hourly wage of \$8 - \$10. The employer was willing to train new hires. (EX 9).

The DOT No. for this position is 249.362-026. The job duties would require the employee to utilize several techniques to locate customers with delinquent accounts an attempt to secure payment. (CX 4). On a typical work day, the worker engages in sitting, fingering/handling, talking/hearing and seeing for approximately 6 – 8 hours. (CX 4). Dr. Nichols approved this position as appropriate for Claimant. (CX 4).

9. Police Dispatcher, City of Hampton

The labor market survey stated that this is a “sedentary position” and was available on November 16, 2000. This position required forty-hour work week, and paid a yearly salary of \$22,268. Qualified candidates had to possess a high school diploma or GED, be able to type 30 words per minute, and have a clean background. (EX 9).

The DOT No. for this position is 193.262-014. The responsibilities of this position included operating radio and telephone equipment to receive calls from emergency services, maintaining communication logs, receiving emergency calls from the public and dispatching emergency services. In an eight hour work day, the employee would engage in sitting and talking/hearing for about 6 – 8 hours, and in fingering/handling and seeing for approximately 4 – 6 hours. (CX 4). Dr. Nichols approved this job description as appropriate for Claimant. (CX 4).

10. Customer Service Representative, GEICO

According to the labor market survey, this full-time “sedentary” position was available on October 17, 2000 and November 16, 2000. It offered a yearly salary range of \$22,775 - \$27,555, and the employer was willing to train new hires. Consideration for the position required a high school diploma or GED, and customer service and communication skills. (EX 9).

The DOT No. for this position is 250.257-010. Its job responsibilities include offering insurance quotes, calculating premium rates, filling in data on policy applications and compiling statistical data. (CX 4). In an eight-hour work day, and employee would stand and walk for no more than two hours. The employee would also engage in sitting, fingering/handling, talking/hearing and seeing for approximately 6 – 8 hours. (CX 4). Dr. Nichols approved this position as within Claimant’s medical restrictions. (CX 4).

11. Sales Counselor, GEICO

On October 17, 2000 and November 17, 2000, this full-time “sedentary” position was open to candidates who held a high school diploma or GED and possessed customer service and communication skills. The employer indicated that it would train new hires, and offered a yearly salary range of \$22,775 - \$24,775. (EX 9).

The DOT No. for this position is 219.387-014. The job responsibilities of this position including answering customers’ questions about insurance rates, inputting customer information in computer program and compiling statistical data. (CX 4). In an eight-hour work day, the worker engages in sitting,

fingering/handling, talking/hearing and seeing for roughly 6 – 8 hours. (CX 4). Dr. Nichols approved of this job description for Claimant. (CX 4).

12. Collections Agent, Portfolio Recovery Associates

The labor market survey indicated that this position was available on October 17, 2000 and November 16, 2000. It was a full-time “sedentary” position. The employer indicated that it would consider candidates who had a high school diploma or GED; and who possessed customer service skills, a stable work history, and a familiarity with computers. The yearly salary for this position ranged from \$19,000 - \$24,000. (EX 9).

The DOT No. for this position is 249.362-026. The job duties would require the employee to utilize several techniques to locate customers with delinquent accounts an attempt to secure payment. (CX 4). On a typical work day, the worker engages in sitting, fingering/handling, talking/hearing and seeing for around 6 – 8 hours. (CX 4). Dr. Nichols approved this position as appropriate for Claimant. (CX 4).

13. Dispatcher, Guy Heating and Cooling

This sedentary position was available on November 8, 2000 and November 15, 2000. The employer was willing to train its news hires, and required that its employee be able to work independently. This full-time position offered an hourly wage of \$8 - \$10. (EX 9).

The DOT No. for this position is 249.167-014. The duties for this position include assigning vehicles, workers and driver; recording the details of each trip; using a radio to communicate with drivers; recording all calls and work orders; and engaging in customer service. (CX 4). A worker performs the following physical activities in an eight hour work day: sitting, fingering/handling, talking/hearing and seeing; all for about 6 – 8 hours. (CX 4). Dr. Nichols approved of this job description for Claimant. (CX 4).

14. Collections representative, NCO Financial Group

The labor market survey indicated that this position was “sedentary” and was available on October 13, 2000 and November 15, 2000. The position required forty hours a week, and paid \$7 - \$8 an hour. The employer was willing to train new hires and preferred candidates with customer service skills and a good phone voice. (EX 9).

The DOT No. for this position is 249.362-026. The job duties require the employer to utilize several techniques to locate customers with delinquent accounts an attempt to secure payment. (CX 4). On a typical work day, the worker engages in sitting, fingering/handling, talking/hearing and seeing for

roughly 6 – 8 hours. (CX 4). Dr. Nichols approved this position as appropriate for Claimant. (CX 4).

15. Retail Store Manager, Dollar General

According to the labor market survey, the physical demands of this position, which was available on November 8, 2000, were “light.” It was full-time work, and paid a yearly salary ranging anywhere from \$20,000 - \$40,000. Qualified candidates possessed organizational skills, retail experience, customer service skills, and supervisory experience. (EX 9).

The DOT No. for this position is 185.117-010. An employee in this position coordinates department store activities, formulates pricing policies, negotiates and approves contract with suppliers, and prepares employees schedules and time sheets. (CX 4). This position requires standing and walking for less than two hours of an eight hour work day. This position also calls for the employee to engage in sitting, fingering/handling, talking/hearing and seeing for approximately 6 – 8 hours each work day. (CX 4). Dr. Nichols found this to be an appropriate position for Claimant. (CX 4).

16. Customer Service Representative, QVC Inc.

This full-time “sedentary” position was open on October 15, 2000. The employer indicated that it was willing to train new hires, and only considered applicants who possessed a high school diploma or GED, was at least 18 years old, and had a familiarity with the keyboard. This position paid \$8.65 an hour. (EX 9).

The DOT No. for this position is 249.362-026. The job duties involved processing orders and engaging in customer service. (CX 4). An eight-hour work day would require an employee to engage in sitting, fingering/handling, talking/hearing and seeing for around 6 – 8 hours. (CX 4). This position was approved by Dr. Nichols for Claimant. (CX 4).

17. Data Entry Representative, AcSEL Corporation

The labor market survey detailed this full-time “sedentary” position. This position was available on October 8, 2000. Preferred applicants possessed customer service skills and a good phone voice, and the employer was willing to train new hires. The hourly wage for this position ranged from \$7.00 - \$8.00. (EX 9).

The DOT No. for this position is 203.582-054. The job responsibilities of this position involved operating a data entry device and comparing the data entered with that on the document. In an eight-hour work day, an employee in this position would engage in sitting, fingering/handling, talking/hearing and

seeing; all for about 6 – 8 hours. (CX 4). Dr. Nichols approved of this job description for Claimant. (CX 4).

18. Appointment Setter, Steel Master

This position was for full-time “sedentary” work, and was open on October 2, 2000. The employer preferred reliable candidates, and was willing to train its new employees. The position compensated \$8.00 an hour. (EX 9).

The DOT No. for this position is 237.367-010. Job duties included scheduling appointments, maintaining the appointment book, and contacting customers with appointment reminders. On a typical work day, the employer would engage in roughly 6 – 8 hours of sitting, fingering/handling, talking/hearing and seeing. (CX 4). Dr. Nichols approved this job description as within the medical restrictions placed on Claimant. (CX 4).

19. Dispatcher, OST Trucking Company

As detailed by the labor market survey, this full-time “sedentary” position was available on September 13, 2000. Consideration for this position required an applicant who was able to handle multiple tasks and team of a driver, and possess good communication skills. The hourly rate for this position ranged from \$10 to \$15. (EX 9).

The DOT No. for this position is 249.167-014. The duties for this position included assigning vehicles, workers and driver; recording the details of each trip; using a radio to communicate with drivers; recording all calls and work orders; and engaging in customer service. (CX 4). A worker performs the following physical activities in an eight hour work day: sitting, fingering/handling, talking/hearing and seeing; all for around 6 – 8 hours. (CX 4). This position was approved by Dr. Nichols as within Claimant’s medical restrictions. (CX 4).

20. Van Driver, Park, Shuttle & Fly

This “light” position was available on September 11, 2000. It required forty hours a week of work, and paid \$7 to \$9 an hour. Qualified candidates were required to possess a high school diploma or GED, a valid driver’s license and a good DMV record. (EX 9).

The DOT No. for this position is 913.663-018. Its main job responsibility involves transporting passengers in a vehicle to and from the airport. (CX 4). An eight hour work day would require a worker to engage in sitting, seeing, operating motor vehicle and exposure to gas/fumes for approximately 6 – 8 hours a day; and fingering/handling for about 4-6 hours a day. (CX 4). Dr. Nichols approved this job description for Claimant. (CX 4).

21. Directory Assistance Associate, G.C. Services

The labor market survey found that this full-time “sedentary” position was open on September 8, 2000. The employer was willing to train its new hires, and preferred applicants who held a high school diploma or GED, and who possessed customer service and communication skills. This position paid \$10 an hour.

The DOT No. for this position is 235.462-101. The job description detailed the responsibilities of this position as handling incoming calls from customers using a headset and typing information onto a computer. In an eight hour work day, the worker would engage in sitting, fingering/handling, talking/hearing and seeing for roughly 6 – 8 hours. (CX 4). This position was approved by Dr. Nichols as suitable considering Claimant’s medical restrictions. (CX 4).

Ms. Byers opined that \$10-\$11 an hour for a forty hour work week was a good range of earning capacity for Claimant. (TR. at 107). In reaching this conclusion, Ms. Byers explained that Claimant is “certainly qualified for the dispatcher and customer service jobs. The lowest paying of these jobs is \$10 an hour [. . .]” (TR. at 107).

Ms. Byers testified that she had scheduled a second meeting with Claimant, at which she intended to help secure Claimant a different job. (TR. at 108). Ms. Byers noted that she was planning to ask Claimant to apply for dispatcher position with a bus company; a job Ms. Byers opined was very suitable for Claimant. (TR. at 109). However, the two were never able to arrange the meeting. (TR. at 109). Ms. Byers explained that this was a sedentary position that requires the employee to take calls and arrange schedules and routes for the drivers. The salary for this position was \$26,500 a year. (TR. at 109). Ms. Byers noted that because she did not meet with Claimant for a second time, she never actually was able to refer this position as potential employment. (TR. at 111).

Analysis

Section 20(a) of the Act provides Claimant with a presumption that her disabling condition is causally related to her employment if she shows that she suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff’d*, 892 F. 2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Once Claimant has invoked the presumption, the burden shifts to Employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, [56 S. Ct. 190, 80 L. Ed. 229] (1935). The BRB effectively affirmed the finding that Claimant’s injury is causally related to her employment. (BRB Op. at 3). Thus, the real issue to be determined on remand is the nature and extent of Claimant’s injury.

Nature and Extent of Disability

Claimant, a firewatch, sustained a work-related injury on April 4, 2000. Employer voluntarily paid Claimant temporary total disability benefits from April 8, 2000 until April 17, 2000, at which time she returned to work for Employer as an administrative assistant. Claimant was laid off from that position on September 8, 2000, as a part of a company-wide economic reduction-in-force. Claimant began work as a sales associate with Dillard's Department Store on March 5, 2001.

Thus, Claimant seeks temporary total disability benefits commencing September 8, 2000, through and including March 5, 2001. Claimant additionally seeks temporary partial disability benefits from March 5, 2001 to the present and continuing. The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its permanent or temporary nature and its total or partial extent. The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

As to the nature of the benefits sought in the present case, Claimant seeks temporary disability benefits commencing September 8, 2000, to the present and continuing. A claimant's disability becomes permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask*, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). There is no disagreement in the record concerning the fact that Claimant has yet to reach MMI. Thus, any disability suffered by Claimant is temporary in nature.

As to the extent of the benefits sought in the present case, Claimant seeks total disability benefits commencing September 8, 2000, through and including March 5, 2001. Claimant additionally seeks partial disability benefits from March 5, 2001, the first date of her employment at Dillard's, to the present and continuing. To establish a *prima facie* case of total disability, a claimant must show that she is unable to return to his regular or usual employment due to his work-related injury. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979); *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 92 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 342-43 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Eller & Co. v. Golden*, 620 F.2d 71, 74 (5th Cir. 1980); *Ruiz v. Universal Mar. Serv. Corp.*, 8 BRBS 451, 454 (1978). Once claimant cannot return to her usual work, she has established a *prima facie* case of total disability, and the burden shifts to

the employer to establish the availability of suitable alternate employment. *Trans-State Dredging*, 731 F.2d at 200; *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director*, OWCP, 8 F.3d 29 (9th Cir. 1993).

The BRB has instructed that in the present case, Claimant's usual work is that which she was performing at the time of her injury. Thus, because Claimant was working as a firewatch when she was injured, only this job, and not her subsequent job as an administrative assistant for Employer, can constitute her "usual" employment for the purposes of establishing her *prima facie* case of total disability. See *Manigault v Stevens Shipping Co.*, 22 BRBS 332 (1989); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). The BRB found that Claimant has established that she is physically unable to return to her pre-injury firewatch employment because of her work injury. (BRB Op. at 3). Therefore, Claimant has established a *prima facie* case of total disability for the period of September 8 2000 until March 4, 2001.

Suitable Alternate Employment

Because Claimant has made a *prima facie* showing that she was totally disabled since she was terminated on September 8, 2000 until she began her employ with Dillard's on March 5, 2001, the burden shifts to Employer to show suitable alternate employment. *Trans-State Dredging*, 731 F.2d at 200; *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). If Employer fails to rebut the *prima facie* case of total disability, Claimant will be considered totally disabled and entitled to permanent total disability. *Manigault*, 22 BRBS at 33; *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49, 54 (1988).

The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the local community. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), *rev'g*, 5 BRBS 418 (1977); *Bumble Bee Seafoods v. Director*, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given her age, education, work experience, and physical restrictions. *Edwards v. Director*, OWCP, 999 F.2d 1374 (9th Cir 1993), *cert. denied*, 114 S. Ct. 1539 (1994); *Turner*, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternate employment. *Trans-State Dredging v. Benefits Review Bd. (Tanner)*, 731 F.2d 199, 201, 16 BRBS 74, 75(CRT) (4th Cir. 1984), *rev'g*, 13 BRBS 53 (1980); *Turner*, 661 F.2d at 1043, 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternate employment. *P & M Crane Co. v Hayes*, 930 F.2d 424, 430 (5th Cir. 1993).

An employer may discharge its burden of establishing suitable alternate employment by offering a claimant a job in its facility, including a light-duty job, as long as it does not constitute sheltered employment. *Darby v. Ingalls Shipbuilding, Inc.* 99 F.2d 685, 688 (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

Employer offers the testimony of Mr. Sampson as evidence that Claimant was re-offered the position of administrative assistant in 2001. (TR. at 92). However, Claimant testified that she did not recall this occurrence. (TR. at 42). Claimant further testified that she would have

preferred returning to the administrative position with Employer, rather than working at Dillard's, if there was such an opening. (TR. at 43). I find Claimant's testimony to be more credible, specifically because of her desire to resume the administrative position. (TR. at 42). She specifically testified that she would have returned to the employ of Employer in the administrative capacity had she been given the opportunity; because she has not returned implies that she was never offered the opportunity. Further, no evidence, other than Mr. Sampson's testimony, has been offered to establish the need to fill an administrative assistant position with Employer at the time it was allegedly offered to Claimant. Mr. Sampson himself testified that he interacted with Claimant only when she worked in the firewatch position. (TR. at 91). It is thus unclear from where his authority to offer the administrative position would stem. Mr. Sampson further noted that he did not offer a position to Claimant's cousin as he was unaware of any available positions. (TR. at 96). His testimony is suspicious because it appears to imply that he was able to only offer this one particular administrative position to Claimant alone. It seems that such hiring procedures would complicate Employer's human resources activities. I thus find that there is insufficient evidence to establish that Employer offered to rehire Claimant in 2001.

However, Employer may rely on the testimony of vocational experts to establish the existence of suitable alternate employment. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 (1985); *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473; 477-80 (1978). See also *Armand v. American Marine Corp.*, 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380, 384 (1983); *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981). See also *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985).

When referencing the external labor market through a labor market survey to establish suitable alternate employment, an employer must "present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform." *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988). According to the Fourth Circuit, "[i]f a vocational expert is able to identify and locate only one employment position, it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." *Id.* The purpose of the labor market survey is not to find the claimant a job, but to determine whether suitable work is available for which the claimant could realistically compete. *Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). The employer may meet this burden of showing suitable available employment by "presenting evidence of jobs which, although no longer open when located, were available during the time the claimant was able to work." *Id.*

Employer argues that the twenty-one positions, as outlined by Ms. Byers in the labor market survey, constitute suitable alternate employment within Claimant's work restrictions and abilities and that Claimant could obtain if she diligently tried. Employer asserts that these positions are sedentary in nature and are plainly within Claimant's medical restrictions.

Employer additionally notes that Dr. Nichols, Claimant's treating physician, approved of all but the sales associate position without modification. Additionally, Employer argues that the evidence supports the conclusion that all of the jobs identified in the labor market survey are within Claimant's geographic area.

First, the labor market survey indicated that there were several customer service positions available with America Funds Group, City of Chesapeake, City of Portsmouth, Nations Bank, GEICO and QVC, Inc. I find that these customer service positions constitute suitable alternate employment, considering Claimant's age, experience, physical restrictions, and work experience. As previously stated, this job is generally available within Claimant's geographic area during Claimant's disability. Claimant has customer service experience in her work history, prompting Ms. Byers to testify that Claimant is "certainly qualified for the [...] customer service jobs." (TR. at 107). Additionally, Dr. Nichols approved this position, as it involves sedentary work, and requires no standing or walking. Therefore, I find that this position constitutes suitable alternate employment.

I also find that the position of police dispatcher available with the City of Virginia Beach, City of Suffolk, City of Chesapeake, and City of Hampton, constitutes suitable alternate employment, considering Claimant's age, experience, physical restrictions, and work experience, and is within her geographic area. The jobs were also available in 2000, during Claimant's disability. These positions would require Claimant to only engage in negligible sitting and standing, and would not have to lift any weight. Dr. Nichols approved this position as within Claimant's restrictions, and Ms. Byers testified that, given Claimant's education and experience, Claimant is "certainly qualified for the dispatcher [...] jobs." (TR. at 107). Therefore, I find that this position represents suitable alternate employment.

I find that the Van Driver position with Park, Shuttle and Fly does not constitute suitable alternate employment. This position requires an eligible candidate to possess a valid driver's license and to have a good DMV record. (EX 9). Claimant's recent driving record is unclear from the record, and the labor market survey merely notes that she was involved in a car accident several years ago. This position would require Claimant to drive passengers in a minibus, van or lightweight truck. There is no evidence that Claimant has any experience operating these types of vehicles. Additionally, the labor market survey specifically indicates that Claimant has difficulty getting in and out of her car. (EX 9). Therefore, I find that this position does not constitute suitable alternate employment.

The position with GEICO of sales counselor constitutes suitable alternate employment. Dr. Nichols approved of this position because it does not require Claimant to engage in extended lifting, standing or walking. (EX 9). Claimant meets the educational requirements for a qualified candidate, and on-the-job training was provided in this position. This position was available in Claimant's geographic region in September of 2000, during the period of her disability. (EX 9). Thus, I find that Employer has met its burden in proving that the sales counselor position with GEICO constitutes suitable alternate employment within the physical restrictions placed upon Claimant.

The collections agent positions available with both Portfolio Recovery Associates and NCO Financial Group constitute suitable alternate employment, considering Claimant's age,

experience, physical restrictions, and work experience. As requested by these prospective employers, Claimant possesses a high school diploma and is proficient with the computer. (EX 9). This job was available as early as September of 2000 within Claimant's geographic area, and this position falls into the category of sedentary work. (EX 9). Dr. Nichols found that the employment requirements of these sedentary positions coincided with Claimant's medical restrictions. (CX 9). Therefore, I find that this position represents suitable alternate employment.

The position of appointment setter with Steel Master represents suitable alternate employment. This position was approved by Dr. Nichols, as it clearly falls within Claimant's medical restrictions. (CX 4). It involves mainly clerical tasks similar to Claimant's previous employment experiences, and on-the-job training is provided. Additionally, this position is located in Claimant's geographic area, and was available in September of 2000. (EX 9). Therefore, I find that this position constitutes suitable alternate employment.

The dispatcher positions available with Guy Heating & Cooling and OST Trucking constitute suitable alternate employment. These positions fall into the category of sedentary work, which Dr. Nichols opined Claimant could perform, and would require Claimant to walk and stand in only negligible amounts, and does not require heavy lifting. (EX 9). The main job responsibility is scheduling, a task in which Claimant possesses prior experience. Both of these potential employers are located near Claimant's home, and both were available during Claimant's disability. (EX 9). Therefore, I find that the dispatcher position represents suitable alternate employment.

As to the position of retail store manager with Dollar General, I find that this position fails to constitute suitable alternate employment. Claimant does not have the supervisory experience required for consideration of this position. (EX 9). Additionally, though it was approved by Dr. Nichols, the requirements for this position require at least two hours each of both standing and walking. (CX 4). There is no indication that this employer would make any accommodation for Claimant, who is restricted to performing these activities for a mere fifteen minutes every hour. Therefore, I find that this position does not represent suitable alternate employment.

I find that the Data Entry Representative position with AcSEL Corporation represents suitable alternate employment. Claimant is proficient in keyboarding, which is the main responsibility in this position. (EX 9). Dr. Nichols approved this sedentary position, as it clearly complies with Claimant's physical restrictions. (CX 4). This potential employment was located in Claimant's geographic area, and was available in October of 2000. (EX 9). Finally, Claimant has the required high school education background, and I therefore find that this position constitutes suitable alternate employment.

The Directory Assistance Associate position with G.C. Services is suitable alternate employment. This position falls into the category of sedentary work, which Dr. Nichols opined Claimant could perform, and would allow not require Claimant to engage in standing, walking or lifting. (CX 4). This position requires no previous experience and also notes that on-the-job training is provided. (EX 9). This potential employer was geographically located near Claimant,

and this position initially became available in September of 2000. (EX 9). As requested by this potential employer, Claimant possesses customer service skills and a high school diploma. (EX 9). Thus, I find that this position represents suitable alternate employment.

Finally, although not approved by Dr. Nichols, the Sales Associate Position with Dillard's is suitable alternate employment. Claimant has worked in this position since March 4, 2001, despite the fact that her job responsibilities exceed her medical restrictions. The BRB noted that by holding this employment, "[C]laimant in effect concedes that the position at Dillard's constitutes suitable alternate employment." (BRB opinion at 4, fn.2). Claimant thereby possesses the skills required to obtain such position. Ms. Byers opined that had Claimant "applied earlier, she clearly would have been hired sooner than 3/3/01." (CX 4). This opinion is reasonable as such position was available in Claimant's geographic region as early as September 1, 2000. (EX 9). Thus, I find that the sales associate position constitutes suitable alternate employment.

In summary, I find that Employer has met its burden of proving that the following nine general positions constitute suitable alternate employment: (1) customer service positions available with America Funds Group, City of Chesapeake, City of Portsmouth, Nations Bank, GEICO and QVC, Inc.; (2) police dispatcher available with the City of Virginia Beach, City of Suffolk, City of Chesapeake, and City of Hampton; (3) GEICO of sales counselor; (4) collections agent available with both Portfolio Recovery Associates and NCO Financial Group; (5) of appointment setter with Steel Master; (6) position at Guy Heating & Cooling and OST Trucking; (7) Data Entry Representative position with AcSEL Corporation; (8) Directory Assistance Associate position with G.C. Services; and, (9) Sales Associate Position with Dillard's. The position of retail store manager with Dollar General fails to constitute suitable alternate employment because Claimant does not have the supervisory experience required of a qualified candidate. Additionally, the Van Driver position with Park, Shuttle and Fly does not constitute suitable alternate employment because it is unclear from the record whether Claimant is qualified for this position.

I find that these aforementioned jobs represent a range of available jobs for which Claimant could realistically compete. Because Employer has satisfied its burden of establishing the existence of suitable alternate employment, I will next consider whether the evidence demonstrates that Claimant diligently sought employment.

Diligent Employment Search

Once the employer demonstrates the existence of suitable alternate employment the claimant can nonetheless establish total disability by demonstrating that she tried with reasonable diligence to secure such employment and was unsuccessful. *Turner*, 661 F.2d at 1042-1043; *Hayes*, 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." *Turner*, 661 F.2d at 1038, *quoting Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).

The evidence does not support a finding that Claimant conducted a diligent job search September 8, 2000 until March 4, 2001. In fact, the evidence suggests that Claimant did not seek additional employment until she applied for the position with Dillard's. Thus, because Employer has established that suitable alternate employment was available and Claimant has not established that he diligently sought employment, I find that Claimant has failed to establish total disability. As a result, Claimant can, at most, establish partial disability. As Claimant is seeking a temporary partial award not covered by the schedule, any award must be based on the difference between Claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21)(h); *Richardson v. General Dynamics Corp.*, 23 BRBS (1990); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988).

Rate of Compensation

Section 8(e) of the Act provides:

In the case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. § 8(e). Thus, Employer is only liable for compensation benefits based on two-thirds of the difference between Claimant's pre-injury average weekly wage and her reduced post-injury wage earning capacity. *Id.*

The parties stipulated Claimant's pre-injury average weekly wage at \$272.99. (TR. at 18). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. See *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). In determining whether the employee's actual post-injury wages fairly and reasonably represent her wage-earning capacity, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which she can perform post-injury. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). To calculate a claimant's wage earning capacity utilizing the results of a labor market survey, the trier of fact may average the wages of suitable alternate positions identified. *Avondale Industries v. Director, OWCP*, 137 F.3d 326 (5th Cir. 1998).

Following her termination with Employer on September 8, 2000 and prior to her employment with Dillard's commencing on March 5, 2001, Claimant did not have any actual post-injury wages. However, as discussed above, suitable alternate employment was available during this time. The average of the wages of the acceptable positions yields an hourly rate of

\$9.68.⁸ This results in a possible post-injury weekly wage of \$387.20 per week for a forty hour work week. Because this exceeds Claimant's pre-injury average weekly wage of \$272.99, I find that Claimant has suffered no loss of wage-earning capacity, and is thus not entitled to disability benefits for period of September 8, 2000 until March 4, 2001.

Additionally, the BRB held that, by seeking only temporary partial disability from March 4, 2001, Claimant effectively concedes that the position at Dillard's constitutes suitable alternate employment. However, consideration is not limited to this position if other suitable positions were available during the period in which Claimant was able to work. *See Pendrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Dr. Nichols opined that the work requirements of the Dillard's position exceed Claimant's medical restrictions, and thus declined to approve this position as appropriate for Claimant. As discussed above other, more suitable, positions were consistently available during the period of Claimant's disability, and thus better reflect Claimant's wage earning capacity following March 4, 2001, despite her employment with Dillard's. As discussed above, the average hourly rate of these positions was \$9.68, yielding a possible post-injury weekly wage of \$387.20. Again, because this exceeds Claimant's pre-injury average weekly wage of \$272.99, I find that Claimant has not suffered a loss of wage-earning capacity, and is thereby not entitled to temporary partial disability benefits.

Photography Wage Information

The BRB ordered that on remand, Employer's contentions should be addressed concerning Claimant's failure to provide wage information pursuant to Employers' Request for Production of Documents. Employer argued that Claimant's refusal to provide her 2000 W2 forms and tax returns rendered it impossible to ascertain whether or not Claimant suffered any temporary partial disability following the termination of her employment with Employer on September 8, 2000. The BRB held in this matter that if Claimant was self-employed as a photographer, and the wages of this position were not included in Claimant's average weekly wage, they should not be taken into account in computing Claimant's post-injury wage-earning capacity. *See generally Harper v. Office Movers/I.E. Kane, Inc.*, 19 BRBS 128 (1986).

Although Claimant worked for Lifetouch, and did not appear to have been self-employed as a photographer, the parties stipulated that stipulated average weekly wage accounted for Claimant's wages with Employer only. (TR. at 18). Accordingly, because Claimant's income from Lifetouch was not included in Claimant's average weekly wage, it should be taken into account in computing Claimant's post-injury wage-earning capacity. Nevertheless, as held above, the Claimant does not have a post-injury loss of wage earning capacity, even without considering any self-employed wages as a photographer.

⁸ If a range of wages was listed for a particular position, the lowest figure in that range was considered in reaching this average. The positions included in this calculation offered hourly wages of \$8.92, \$8.00, \$8.00, \$7.00, 8.65, \$7.00, \$8.00, \$10.00. Other suitable alternate employment positions offered a yearly salary, which calculated out to the following hourly rates: \$10.58, \$11.28, \$7.75, \$10.30, \$10.71, \$10.95 and \$9.13. The average of all of these figures yielded an hourly rate of \$9.68.

Order

Accordingly, it is hereby ordered that the claim of Cynthia Daniels for compensation under the Act is denied.

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RICHARD E. HUDDLESTON
Administrative Law Judge